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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1310

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

[redacted]
BARBARA GARDNER, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND BARBARA GARDNER, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this matter on November 28, 1973.

OPINIONS BELOW

The August 18, 1971, opinion of the United States District Court for the Southern District of Indiana is reported at 332 F.Supp. 655. That decision was affirmed on appeal by the United States Court of Appeals for the Seventh Circuit, which decision is reported at 474 F.2d 81 (7th

Cir. 1973). A Petition for Certiorari was denied by this Court, which denial is reported at 37 L.Ed.2d 1041 (1973). None of these opinions have been reprinted in the Appendix for the reason that they involved issues which are totally unrelated to the issue presented in this Petition. Moreover, the Respondents, Barbara Gardner, et al., were not parties to any of the prior litigation in this case. The unreported opinion of the United States District Court for the Southern District of Indiana, entered September 28, 1972, *nunc pro tunc* to September 15, 1972, is reprinted as Appendix A to this Petition. The Order of the United States District Court for the Southern District of Indiana, entered September 28, 1972, *nunc pro tunc* to September 15, 1972, is reprinted as Appendix B to this Petition. The unreported opinion of the United States Court of Appeals for the Seventh Circuit, affirming the District Court's decision, is reprinted as Appendix C to this Petition. The September 24, 1973, Order of the United States Court of Appeals for the Seventh Circuit is reprinted as Appendix D to this Petition. The November 8, 1973, Order of the United States Court of Appeals for the Seventh Circuit is reprinted as Appendix E to this Petition. The November 28, 1973, Order of the United States Court of Appeals for the Seventh Circuit, wherein attorneys' fees were granted to the counsel for Respondents, Barbara Gardner, et al., is reprinted as Appendix F to this Petition. The December 10, 1973, Order of the United States Court of Appeals for the Seventh Circuit, clarifying the November 28, 1973 Order, is reprinted as Appendix G to this Petition.

JURISDICTION

The Board of School Commissioners of the City of Indianapolis, Indiana, Erle A. Kightlinger, Jessie Jacobs, Carl Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez, W. Fred Ratcliff, members of the Board of School Com-

missioners of the City of Indianapolis, and Karl R. Kalp, as Superintendent of Schools, are petitioners herein. Barbara Gardner, for herself and for her next friends, Sheryl and Tamara Gardner, Sharon, Shawn, and George Hendricks, and Farah Davidson, Melinda Smith, for herself and for her next friends, Edith, April, James and Robert Torrence, and Josephine Taylor, for herself and for her next friends, Regina, Kevin, Timmy, Martha, Vickie and Iris Taylor, are the respondents herein, who were represented by Legal Services Organization of Indianapolis, Inc. in the proceedings below. The United States of America is also a named respondent herein, but it would appear that it has no interest in the issue before this Court.

The Order of the Court of Appeals was entered on November 28, 1973. The Petition for Certiorari was filed less than 90 days from the date of the Order of the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in taxing attorneys' fees as costs against a public school corporation pursuant to Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. Section 1617, where the prevailing plaintiffs incurred no legal expenses for the legal services performed on their behalf for the reason that the services were provided free of charge by Legal Services Organization of Indianapolis, Inc. which organization, similar to the defendant school corporation, is funded almost entirely with public funds?

2. Does Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. Section 1617, require the presentation of some evidence and a finding by the trial court that "the proceedings were necessary to bring about compliance" before a court of the United States can properly tax at-

torney fees as costs against a defendant pursuant to the statute?

STATUTORY PROVISIONS INVOLVED

This case involves Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. Section 1617. This statute has been reprinted in Appendix H herein.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was initially invoked pursuant to 42 U.S.C. Section 2000C-6(a) and (b), and 28 U.S.C. Section 1345. The Respondents, the intervening plaintiffs Gardner, et al., were permitted by the District Court to intervene in this cause and to file a new complaint at a time when the original case was pending appeal in the United States Court of Appeals for the Seventh Circuit.

This litigation began on May 31, 1968, when the United States of America filed a school desegration action in the United States District Court for the Southern District of Indiana, the Honorable S. Hugh Dillin, Presiding Judge. The defendants in said cause were the Board of School Commissioners of the City of Indianapolis, Indiana, and its individual members (hereinafter sometimes referred to as the Board). On August 18, 1971, the trial judge filed its Memorandum of Decision in favor of the United States and directed certain interim orders against the Board. That opinion is reported at 332 F. Supp. 655 (1971). The judgment of the District Court was affirmed by the United States Court of Appeals for the Seventh Circuit on February 1, 1973, which decision is reported at 474 F.2d 81 (1973). The Board's petition for Certiorari was denied by this Court on June 25, 1973, which denial is reported at 37 L.Ed. 2d 1041 (1973).

The Gardner Plaintiffs and Legal Services Organization

On September 7, 1972, while the appeal was pending in the Court of Appeals, the Respondents (hereinafter sometimes referred to as the Gardner plaintiffs) filed a motion to intervene and a new complaint in the District Court. The complaint alleged that the Board had violated the District Court's Order of August 18, 1971, by promulgating a Board Resolution which altered the attendance zones for two schools located within the school city of Indianapolis and which also altered the grade structure at one of the schools in question. The issues formed by the Gardner plaintiffs' complaint were tried before the District Court on September 13, 1972, said trial concluding on September 15, 1972. On September 28, 1972, the District Court entered its Memorandum of Decision *nunc pro tunc* to September 15, 1972. App. p. A1[1]. The District Court found for the Gardner plaintiffs, holding that the Board had committed an act of *de jure* segregation in passing the Resolution in question. *At no time while this cause was pending in the District Court did the Gardner plaintiffs seek an allowance for attorney fees.*

The Gardner plaintiffs were represented by Legal Services Organization of Indianapolis, Inc. (hereinafter L.S.O.). L.S.O. was organized as a non-profit corporation under the laws of the State of Indiana for the purpose of performing free legal services for the poor. L.S.O.'s operations are funded primarily from three sources: (1) the Office of Economic Opportunity in Washington, D. C., (2) the Community Services Program of the City-County Council of Indianapolis, and (3) the Indiana Criminal Justice Planning Agency. The salaries of the attorneys employed by L.S.O., including the attorneys in the present case, are paid from these funds. The basic standard for eligibility for

[1] Citations to the Appendix will be given as "App. p. —."

L.S.O. services is the inability of the applicant to pay a reasonable fee for a lawyer's services. When an applicant is found to be eligible, he is not charged for the services provided him. *The Eligibility Rules of L.S.O. prohibit the acceptance of cases where an attorney's fee is provided by statute.*

The Petitioners appealed the trial court's decision to the United States Court of Appeals for the Seventh Circuit, and on August 10, 1973, the decision of the District Court was affirmed. App. p. A8. As of that date, the Gardner plaintiffs had not sought attorneys' fees. It was not until September 4, 1973, some twenty-five days after the decision of the Court of Appeals, and some 11 days after the time allowed under Rule 39(c) of the Federal Rules of Appellate Procedure, that the Gardner plaintiffs filed a motion in the Court of Appeals seeking leave of the court to file an affidavit of costs including attorneys' fees. The allowance sought related only to the legal services performed on appeal; no fee was sought for the services rendered in the trial court. The Board opposed this motion, and requested oral argument on the issues involved.

By order dated September 24, 1973, the Court of Appeals directed both parties to file simultaneous briefs on the issue as to whether the following words, "upon the entry of a final order by a court of the United States . . .," contained in 20 U.S.C. Section 1617 pertain to a federal court in an appellate proceeding, or such court in a trial proceeding. The Board's request for oral argument was denied. (Docket No. 72-1948, C.A. 7, Order dated September 24, 1973, App. p. A14) After said briefs had been filed, the Court of Appeals granted the Gardner plaintiffs' motion for leave to file an affidavit for costs including attorneys' fees. (Docket No. 72-1948, C.A. 7, Order dated November 8, 1973, App. p. A15.) Thereafter, the affidavit was filed as directed, and

on November 28, 1973, the Court of Appeals awarded $2,500 as attorneys' fees to be paid directly to the attorneys employed by L.S.O. with instructions to them to reimburse the account of L.S.O. (Docket No. 72-1948, C.A. 7, Order dated November 28, 1973, as modified by Order of December 10, 1973, App. pp. A16-17.) The Board opposed and/or responded to every motion or affidavit filed in the Court of Appeals by the Gardner plaintiffs.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

In *Northcross v. Board of Education*, — U .S. —, 37 L.Ed. 2d 48, 93 S.Ct. — (1973), this Court, in a *per curiam* opinion, Mr. Justice Marshall not participating, set forth the standard or rule which should be applied by a court when determining whether to tax attorney's fees as costs in favor of a successful plaintiff pursuant to Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. 1617. This Court concluded:

> "... that if other requirements of Section 718 are satisfied, the successful plaintiff 'should ordinarily recover an attorney's fee *unless special circumstances would render such an award unjust.*' " (Our emphasis) 37 L.Ed. 2d at 51.

Petitioners respectfully submit that the Court of Appeals either failed to apply the rule enunciated in *Northcross, supra*, or, if the rule was applied, the Court erred by failing to find that special circumstances exist which render the award of attorneys' fees to L.S.O. unjust. Due to the fact

that the Court declined to make any findings or give any reasons to justify its action, it is impossible to ascertain what rule was applied by the Court in determining that an award was proper under the statute.

It is Petitioners' contention that Congress, in enacting 20 U.S.C. Section 1617 (hereinafter Section 718), never intended that a defendant public school corporation should be required to pay attorney's fees for legal services performed by organizations such as L.S.O., which organization was specifically formed and publicly funded to provide free legal assistance to the poor. An award to L.S.O. fails to serve any recognized purpose underlying the enactment of this statute. One purpose recognized in *Northcross* was "to encourage individuals injured by racial discrimination to seek judicial relief." 37 L.Ed. 2d at 51. Here, no such encouragement was necessary. The opportunity to receive free services from L.S.O. *without regard to any consideration of success* is certainly more encouraging than the benefits of Section 718, which allows fees only to the successful plaintiff.

The only other purpose of such an award would be its penalizing effect. However, in the instant case both the Indianapolis Public Schools and L.S.O. are funded almost entirely with public funds. Legislative bodies, such as Congress, the Indiana General Assembly and local councils in the City of Indianapolis appropriate funds deemed sufficient to finance the desired level of operations and activities which are to be conducted by the public schools and L.S.O. No meaningful penalty is imposed by requiring a public school corporation to pay part of its appropriated funds to another corporation funded with public funds when such requirement arises merely because L.S.O. rendered the very services which it was specifically organized and funded to perform. It is for this reason, no doubt, that

the statute expressly prohibits such an award in cases where the United States is the successful plaintiff.

Indeed, if a "penalty" was actually intended it will be in the form of a reduction in the funds deemed necessary by the people of Indianapolis to operate the public schools. This reduction will either necessitate higher taxes to compensate for the reduction, or it will require the restriction of planned expenditures in other areas, thus lowering the quality of the education offered. Here, the Gardner plaintiffs are residents of Indianapolis and they also receive the educational benefits offered by the public schools; thus, regardless of the action taken to compensate for the reduction, the penalty imposed will fall upon the Gardner plaintiffs. Such a result could not have been the intent of Congress.

The Order of the Court of Appeals is also significant when one considers that it has established a means by which L.S.O. may enter into direct competition with the private bar. Previously, the existence of organizations such as L.S.O. was justified for the reason that it was presumed they would not accept fee generating cases. After the court's order, it would appear that if L.S.O. can receive an award pursuant to Section 718, it can probably receive an award under *any statute* authorizing a fee. Federal courts are divided as to whether organizations such as L.S.O. should be allowed to receive attorney's fees. See, for example, *Jones v. Seldon's Warehouse, Inc.*, 357 F. Supp. 886 (1973), (permitting an allowance) and *Givens v. W. T. Grant Co.*, 457 F.2d 612 (2d Cir. 1972), (disallowing an award). In a Memorandum filed in the Court of Appeals, in an attempt to support their argument that the award will benefit the poor, counsel for L.S.O. asserted that an award of fees pursuant to Section 718 may permit L.S.O. to allocate *more time to such cases.* Accordingly, however, this would mean

that less time would be allocated to cases which are not fee-generating in nature. Thus, if Section 718 is construed to permit an allowance to organizations such as L.S.O., its ultimate effect may be to *deprive* poor people of free legal services unless they seek services for which attorney's fees are provided by statute. And, in any event, the simple result is that L.S.O., which is funded with money from federal, state and local levels, has now been encouraged to operate in direct competition with private enterprise, i.e., the private bar.

Petitioners submit that the Order of the Court of Appeals—issued without a hearing or finding at any level of the proceeding—fails to serve the intent of Congress, operates to permit interference with legislative appropriations for the benefit of no one and it provides a mechanism by which a publicly funded corporation can compete directly with private enterprise. For these reasons, Petitioners request this Court to grant Certiorari and review the Order of the Court of Appeals.

II.

The Procedure Employed by the Court of Appeals in Issuing its Order Conflicts with The Decision of Another Court of Appeals on this Same Matter.

In *Johnson v. Combs*, 471 F.2d 84 (5 C.A. 1972), the Court of Appeals for the Fifth Circuit stated:

> "Section 718 requires a threshhold finding by the trial court that the proceedings were necessary to enforce compliance." 471 F.2d at 86, f.n. 2.

As stated before, the only services for which fees were sought were for the services performed by L.S.O. on appeal. For that reason, there was no hearing on this matter in the trial court, and there was no evidence admitted at trial as

to whether an award was proper under the facts of this case. To be sure, facts not in evidence were referred to in written motions on appeal, but due to the summary nature in which Respondents' motions were granted, Petitioners are unable to ascertain whether the Court of Appeals correctly considered these facts.

Petitioners contend that explicit in the *Johnson* decision is that a court should be required to state its findings or reasoning in an order allowing attorney's fees pursuant to Section 718. In the instant case, there has been no such finding at any level of the proceedings. Therefore, from a procedural standpoint, the Court's order conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Johnson, supra,* for the reason that no findings have been made as required by the statute.

For the reasons before stated, Petitioners contend that this procedural conflict should be reviewed and settled by this Court.

CONCLUSION

Wherefore, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA, ET AL., *Plaintiffs,* *vs.* THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL., *Defendants.*	United States District Court, S. D. Indiana, Indianapolis Division. No. IP 68-C-225

MEMORANDUM OF DECISION

Heretofore, on September 7, 1972, Barbara Gardner, Malinda Smith, and Josephine Taylor, for themselves and as next friends of their minor children, whose names are set out out in their petition, filed their petition to intervene herein and to present their complaint against the original defendants for relief with respect to the redistricting for school attendance purposes of elementary schools 111 and 114, which schools are under the jurisdiction of said defendants. Said intervening plaintiffs and their children are negroes, and the substance of their complaint is that the defendant School Board, in its Resolution 1027, adopted August 21, 1972, was in violation of the previous order of the Court entered August 18, 1971.

The Court granted the petition of said parties for leave to intervene herein, and assigned the intervenors' petition for a preliminary injunction for a hearing on September 13, 1972. Hearing was duly commenced on said date, and was concluded on September 15, 1972, at which time the Court made certain findings of fact and conclusions of law and an order, directed to the defendants. The Court further ordered the trial of the action on the merits to be advanced and consolidated with the hearing on the application, pursuant to Rule 65(a)(2), F.R.Civ.P., it appearing that no other or different evidence would be adduced on further hearing.

The Court now reduces to writing said oral findings, conclusions, and order, all pursuant to Rule 52, F.R.Civ.P.

FACTS

On August 18, 1971, after a lengthy trial on the merits, this Court entered its memorandum of decision finding that the defendant Board of School Commissioners of the City of Indianapolis had practiced de jure segregation in the operation of the public schools under its jurisdiction, suggested that the issues and parties be broadened, and entered certain interim orders, including an order to the effect that the Board take steps to assure that schools as to which the percentage of minority race students was approaching the so-called "tipping point," i.e., that point at which integrated schools tend to become resegregated by reason of the migration of whites from the school district, be kept from exceeding such tipping point, which the Board took to mean 40 per cent. The Court further ordered the Board to identify such tipping point schools and to submit to the Court a plan for preventing them from exceeding the percentage of minority race students which, in the Board's judgment, would place them in danger of exceeding the tipping point.

The Board complied with such order, and on September 3, 1971, filed a report tending to show its compliance with said order, and other orders contained in said decision of August 18, 1971. Such report identified elementary School 111, a K-8 school, as being a school in such category, showing that the percentage of negro students had increased from 0 per cent in 1969 to 4.1 per cent in 1970 to 34 per cent in 1971, the dramatic increase between 1970 and 1971 being attributable to the location by other government agencies of two low income housing projects within the territory assigned to School 111. A suggested course of action was proposed, and approved by the Court.

Although the Board's report of September 3, 1971, did not so indicate, a new school, School 114, was under construction in the area then served by School 111. The latter school was planned as a K-6 school, it being the intention of the Board that all seventh and eighth grade pupils in the area would continue to attend School 111. The Board at that time was of the opinion that sound educational practices dictated that seventh and eighth grade pupils at-

tend schools which were of a sufficient size to justify the expenditure of public funds for specialized equipment, such as laboratories, shops, kitchens, etc., and on the other hand it would be beneficial to younger children to be able to attend, insofar as practicable, a school limited to younger pupils. The Board also, and quite properly, took into consideration the Court's order with regard to tipping point schools.

With such considerations in mind, all of which were proper, the Board on June 6, 1972, adopted Resolution 1020, setting up boundary lines for the two schools, carved out of the territory previously occupied by School 111 alone, the results of which resolution continued School 111 as a K-8 school, established School 114 as a K-6 school, and, according to the information available to the Board at the time, would have provided for a racial mix at each school which would have been substantially equal and just under 40 per cent.

Elections for membership on the Board of School Commissioners were held in May of 1972 and a new group of Commissioners was elected, four of whom took office on July 1, 1972. Such individuals have heretofore been substituted as parties defendant herein by this Court's order of September 13, 1972. The successful candidates, as shown by the evidence, campaigned on a platform favoring so-called "neighborhood schools," and opposing the so-called "busing" of students. Shortly after the new members took office on July 1, 1972, some 500, more or less, white citizens residing in the Schools 111-114 area presented a petition and made personal appearances before the Board, demanding that previously adopted Resolution 1020 be rescinded. The Board yielded to the public pressure thus generated and on August 21, 1972, adopted Resolution 1027, setting up a new pupil assignment plan.

Under Resolution 1027, both Schools 111 and 114 would be a K-8 school with the seventh and eighth grades being of comparatively small size. Since there were no facilities in School 114 for such ordinary seventh and eighth grade subjects as shop, home economics, science and the like, the Board entered into a $30,000 contract to change the interior

structure of the brand new school just two weeks before school was to start. Work was progressing at the time of the hearing, with resultant interference with class activities. Seventh and eighth grade teachers were to divide their time by traveling back and forth between the two schools, which are a few blocks apart. Boundary lines between the two school districts were changed from those established by Resolution 1020, so that School 111 was to have a predicted number of negro students in the area of 34 per cent, while School 114 would go up to 47 per cent.

At the hearing, the defendants attempted to rationalize their rescission of Resolution 1020 and adoption of Resolution 1027 by stating that such change was considered to be essential to maintaining proper discipline in the schools, that the educational advantages of the previous plan would not be impaired, and that the Board really believed that it was implementing the Court's order of August 18, 1971, by maintaining School 111 at a white majority of 63 per cent. Having heard the evidence, the Court finds the discipline argument to have been completely unproved, that the weight of the evidence clearly is that the arrangement contemplated by Resolution 1027 is contraindicated from an educational standpoint and that it is in conflict to other past and present practices of the Board with respect to the establishment of junior high schools and middle schools. With respect to the argument that the Board thought it was implementing the Court's order rather than acting in disregard of it, the short answer is that it would have been simple to find out by presenting to the Court a petition for its approval of the plan, which it signally failed to do.

The Court finds as a fact that the action of the defendants in rescinding Resolution 1020 and in adopting Resolution 1027 was motivated primarily by pressure from the white community to maintain School 111 as a "white" school and School 114 as a "black" school, and that such action was in and of itself an act of de jure segregation. For such reasons, the Court concludes, as a matter of law, that such action is unconstitutional and cannot be permitted to stand.

The court further finds, on the basis of the evidence, that the actual percentage of black students in the two dis-

tricts, considered as a whole, is now 45 per cent, and that, in compliance with the Court's order of August 18, 1971, the defendants should be further directed to redistrict such schools with other schools in the neighborhood so as to reduce the percentage of black pupils at each school to not more than 35 per cent.

And now the Court, on its own motion, pursuant to the power reserved in its order of August 18, 1971, finds that the defendants should furnish the Court with a schedule showing the percentage of black students in its various schools for the periods September 1971, June 1972, and September 1972, and further finds that the defendants should obtain the permission of the Court in advance of any further redistricting.

Further, pursuant to such reserved power, the Court finds that both the defendants and the original plaintiff, United States of America, should immediately begin comprehensive planning for final desegregation of the Indianapolis Public School System and provide this Court with a preliminary plan and report no later than January 1, 1973. An order will be entered in accordance herewith.

Dated this 28th day of September, 1972, in confirmation of the oral findings and conclusions expressed September 15, 1972, *nunc pro tunc.*

/S./ S. Hugh Dillin, Judge

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, ET AL., *Plaintiffs,* *vs.* THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL., *Defendants.*	United States District Court Southern District of Indiana Indianapolis Div. No. IP 68-C-225

ORDER

Pursuant to the hearing heretofore had on the intervening petititon and complaint of Barbara Gardner, et al., and the Court's memorandum of decision with respect thereto, which memorandum is in the words and figures following, to wit: (H. I.)

IT IS CONSIDERED AND ORDERED that Resolution 1027, adopted by the defendant Board of School Commissioners of the City of Indianapolis on August 21, 1972, be, and the same is hereby set aside and held for naught.

IT IS FURTHER CONSIDERED AND ORDERED that said defendant, and the individual defendants, members of the Board of School Commissioners and Superintendent of Schools, be, and they are hereby permanently enjoined and prohibited from putting said redistricting plan as expressed in Resolution 1027 into operation.

IT IS FURTHER CONSIDERED AND ORDERED that Resolution 1020 adopted by the said Board on June 6, 1972, be, and the same is hereby reinstated, and the defendants are ordered and directed to implement said plan and to put it into effect forthwith.

IT IS FURTHER CONSIDERED AND ORDERED that the defendants forthwith consider, formulate, and present

to the Court for approval a plan for the further redistricting of Schools 111 and 114 and the surrounding area, in such a fashion as to reduce the percentage of negro pupils in said schools to not more than 35 per cent, and that if such plan requires the transportation of pupils by bus or otherwise that an equal number of white and black pupils be so transported.

IT IS FURTHER CONSIDERED AND ORDERED that the defendants file with the Court forthwith tables showing the percentage of black pupils in the various schools under their jurisdiction as of September 1971, June 1972, and September 1972.

IT IS FURTHER CONSIDERED AND ORDERED that the defendants shall henceforth submit any and all proposed plans of redistricting to the Court for approval before putting the same into effect.

IT IS FINALLY CONSIDERED AND ORDERED that the defendants and the original plaintiff, United States of America, each commence comprehensive planning for final desegregation of the Indianapolis Public Schools, and each of them is hereby ordered to provide to this Court their separate preliminary plans and reports no later than January 1, 1973.

All of which was considered and ordered on September 15, 1972, and is now hereby reduced to writing this 28th day of September, 1972, *nunc pro tunc.*

/S./ S. Hugh Dillin, Judge

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 10, 1973
(Argued June 14, 1973)

Before

HON. LUTHER M. SWYGERT, Chief Circuit Judge
HON. ROBERT A. GRANT, Senior District Judge[1]
HON. JOHN W. REYNOLDS, Chief District Judge[2]

[1] Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

[2] Chief District Judge John W. Reynolds of the Eastern District of Wisconsin is sitting by designation.

No. 72-1948
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, on behalf of themselves and all other members of the class,
Plaintiffs-Appellees,

vs.

THE BOARD OF SCHOOL COMMISSIONEIS OF THE CITY OF INDIANAPOLIS, KENNETH T. MARTZ, CARL J. MEYER, CONSTANCE VALDEZ, LESTER NEAL, PAUL E. LEWIS, CARRIE D. JACOBS, ERLE KIGHTLINGER AND KARL R. KALP,
Defendants-Appellant,

vs.

BARBARA GARDNER, FOR HERSELF AND FOR HER NEXT FRIENDS, CHERYL AND TAMARA GARDNER, SHARON, SHAWN AND GEORGE HENDRICKS AND FARAH DAVIDSON,

MALINDA SMITH, FOR HERSELF AND FOR HER NEXT FRIENDS, EDITH, APRIL, JAMES AND ROBERT TORRENCE,

JOSEPHINE TAYLOR, FOR HERSELF AND FOR HER NEXT FRIENDS, REGINA, KEVIN. TIMMY, MARTHA, VICKIE AND IRIS TAYLOR,
Intervenors-Appellees.

Appeal from the United States District Court for the Southern District of Indiana

No. IP 68-C-225

S. Hugh Dillin, Judge

ORDER

This dispute arises as an adjunct to the Indianapolis school desegregation case which was commenced by the United States in 1968 and came to trial before the district

court in July 1971. An August 18, 1971, the district court issued a decision sustaining the allegations of de jure segregation, enjoining further racial discrimination, and requiring the defendants to take certain specified interim steps "to fulfill their affirmative duty to achieve a nondiscriminatory school system." *United States v. Board of School Commissioners of City of Indianapolis,* 332 F.Supp. 655, 680 (S.D. Ind. 1971). The decision was affirmed by this court on February 1, 1973. *United States v. Board of School Commissioners of City of Indianapolis,* 474 F.2d 81 (7th Cir. 1973).

While appeal on the merits was pending, intervenors-appellees here, black parents and their children, filed a motion to intervene alleging that certain actions taken by the defendants violated the August 18, 1971, order of the district court. They were allowed to intervene, and after a hearing the district court agreed that the actions of defendants violated its previous order and on September 25, 1972, granted injunctive relief. Defendants appeal.

Essentially the district court's order enjoined the defendants from carrying out Resolution 1027, which had been adopted in August 1972, at least until a comprehensive desegregation plan was submitted and approved by the court. In lieu of Resolution 1027 the defendants were ordered to implement Resolution 1020 which it had previously adopted.

Without reiterating the facts in detail, Resolution 1020 set forth the boundary lines for school districts 111 and 114 so as to result in about 38% black enrollment at each school. Under Resolution 1027, School 111 could expect 31% black enrollment and School 114 48%. Defendants offered various reasons for substituting Resolution 1027 for Resolution 1020 relating to the quality of education, the safety of students, and maintenance of discipline.

Primarily defendants contend that regardless of their motives in enacting Resolution 1027, there is nothing wrong with that resolution and that the court erred as a matter of law in enjoining its enforcement. Defendants also contend that all jurisdiction passed from the district court when the notice to appeal was filed.

Certainly the district court had the power to enforce its earlier order while the appeal was pending. The Fifth Circuit addressed defendants' jurisdictional contention in *Plaquemines Parish Commission Council v. United States*, 416 F.2d 952, 954 (5th Cir. 1969):

> "The district court did not lose jurisdiction of the parties merely because an appeal was pending from the desegregation order. Appellants cite no school case authority to support their view that the district court lacks jurisdiction to promulgate additional orders to maintain the status quo and to insure the enforcement of its previous orders. Generally, a district court retains jurisdiction to enforce its prior orders, and this is particularly true with respect to desegregation cases. United States v. Swift & Co., 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932); Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (Brown II); Green v. School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 LEd2d 716 (1968)."

On the merits the district court went so far as to conclude that the adoption of Resolution 1027 was a separate act of de jure segregation in itself, i.e., that it was a public act made with discriminatory intent which in significant part caused a condition of discrimination. To uphold the district court's order, however, we need only find that the court's determination that the defendants had failed to comply with its earlier order was not clearly erroneous.

In the August 18, 1971, order, the district court adopted as an interim measure what is referred to as the tipping point order. The order reflected the court's finding that whites began an irreversible emigration from a school district when the percentage of blacks in the school reached 40%. At least as an interim measure, to preserve the status quo, therefore, it was particularly important to control enrollment at those schools where the percentage of blacks was approaching dangerously near the tipping point. Pursuant to the court's order defendants identified ten elementary schools in the danger zone. School 111 was

on the list. Hence, the order compelled defendants to "take appropriate action" to prevent the school from tipping.

There is no serious question as to the court's authority to issue the tipping point order. Because of the bifurcated nature of school desegregation cases, district courts, upon being shown a constitutional violation, have often ordered immediate adoption of interim remedial steps to eliminate invidious racial distinctions and to preserve the status quo until a comprehensive desegregation plan is developed and implemented. The nature of interim relief is largely left to the equitable discretion of the court. Cf. *Swann v. Board of Education*, 402 U.S. 1, 18 (1972).

In the recent case of *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972), the Supreme Court held that in districts which have not yet eradicted the effects of past segregatory practices, the acceptability of alterations in plans of student assignment should be measured in terms of whether the effect of the change may be to *impede the process of desegregation.* In making this determination the Court indicated that a district judge could properly take into account such factors as the disparity in racial percentages which might be caused by the alteration, the possibility of "white flight" as a result of the action, the effect of the timing of the decision upon the children, and arguments by the school district relating to the feasibility or practicality of the proposed remedy. The Court added that the process of weighing these and other factors "is a delicate task that is aided by a sensitivity to local conditions, and the judgment is primarily the responsibility of the district judge." 407 U.S. at 466.

Here the evidence indicates that the board rescinded a previous resolution which apparently had been designed as a partial fulfillment of its remedial responsibilities. Substituted was a measure which promised to be somewhat less effective at least in terms of racial ratios. It is true, as the defendants point out, that the change in racial ratios was relatively small. On the other hand, this was an area which they had previously identified as "critical" in terms of "tipping," and they have not explained why other nearby

schools with substantially higher percentages of white students should not or could not be involved.

Against the potential effect of Resolution 1027, the district court properly weighed the defendants' justifications to the effect that the change in plans stemmed from educationally valid and racially neutral considerations. The court found as a fact that the evidence did not prove the discipline justification and that the educational merits of the arrangement seemed inferior to those of the prior plan under Resolution 1020. Rather than finding that such educational considerations necessitated the change in student assignment, the Court found that the board was motivated by pressure from the white community to so assign students as to maintain School 111 as a white school and School 114 as a black school.

The board clearly had a responsibility to take actions consistent with the prior orders of the court. If uncertainties existed as to whether alterations in the method of assigning students to School 111 would violate those orders, the alterations should have been submitted to the court for approval prior to their implementtion. The issue here is not whether we would have reached the same conclusion as the district court; the issue is whether the district court abused its discretion. Under these circumstances we are not prepared to say the court was clearly erroneous in determining that further judicial intervention was necessary.

The judgment of the district court is affirmed.

APPENDIX D

UNITER STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

SEPTEMBER 24, 1973

Before

Hon. LUTHER M. SWYGERT, Chief Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	
No. 72-1948 *vs.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. (IP 68 C 225)
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., *Defendants-Appellants,* BARBARA GARDNER, ETC., ET AL., *Intervenors*	

This matter is before the Court on the verified motion of Intervenors-Appellees, filed September 4, 1973, for leave to file a affidavit of plaintiffs-appellees costs and attorney fees and the response to said motion by the defendant-appellants, filed September 17, 1973. Upon consideration whereof;

IR (sic) IS ORDERED that both parties file simultaneous brief, within fourteen (14) days of the date of this order, on the issue as to whether the words, "Upon the entry of a final order by a court of the United States . . ." contained in 20 USC 1617 pertain to a federal court in an appellate proceeding or such court in a trial court proceeding.

IT IS FURTHER ORDERED that the defendants-appellants request for an oral argument on the issues formed by the Verified Motion for Leave to File Affidavit of Plaintiffs-Appellees' Costs be denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
NOVEMBER 8, 1973

Before
Hon. LUTHER M. SWYGERT, Chief Judge
HON. ROGER J. KILEY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1948 *vs.*

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.,
Defendants-Appellants,
BARBARA GARDNER, ETC., ET AL.,
Intervenors.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
(IP 68 C 225)

This matter is before the Court on: (1) the verified motion of Intervenors-Appellees, filed September 4 for leave to file and (sic) affidavit of costs and attorneys fees; (2) the response to said motion filed by Defendants-Appellants on September 17, 1973; (3) the response of Intervenors-Appellees to said response of Defendants-Appellants filed on September 25, 1973; and the simultaneous briefs filed by the parties pursuant to this Court's order of September 24, 1973. On consideration whereof,

IT IS ORDERED that the verified motion of Intervenors-Appellees for leave to file an affidavit of costs and attorney fees be granted. Said affidavit will be served on Defendants-Appellants and filed in this Court on or before November 16, 1973.

IT IS FURTHER ORDERED that Defendants-Appellants file a response with respect to the amounts of costs and fees contained in said affidavit on or before November 23, 1973.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

NOVEMBER 28, 1973

Before
HON. LUTHER M. SWYGERT, Chief Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. (IP 68 C 225)
No. 72-1948 *vs.*	
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., *Defendants-Appellants,* BARBARA GARDNER, ETC., ET AL., *Intervenors-Appellees*	

This matter is before the Court on the motion of Intervenors-Appellees captioned "Application for Attorney's Fees and Costs" filed November 16, 1973 and the response in opposition thereto filed November 23, 1973. On consideration whereof,

IT IS ORDERED that $2,500.00 in attorneys fees be taxed against Defendants-Appellants and be awarded to counsel for Intervenors-Appellees.

IT IS FURTHER ORDERED that costs in the amount of $398.72 be taxed against Defendants-Appellants and be awarded to counsel for Intervenors-Appellees.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

DECEMBER 10, 1973

Before
Hon. LUTHER M. SWYGERT, Chief Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., *Defendants-Appellants,* BARBARA GARDNER, ETC., ET AL., *Intervenors.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. (IP 68 C 225) Hon. S. Hugh Dillin, Judge

No. 72-1948

This matter comes before the Court on intervenors-appellees' reply to defendants-appellants response to their application for attorneys' fees and costs with supporting memorandum opinion, and on intervenors-appellees' motion for reconsideration. On consideration whereof,

IT IS ORDERED that the portion of this Court's order dated November 28, 1973 which taxed $2,500.00 in attorneys fees and $398.72 in costs against defendants-appellants shall stand and not be disturbed.

IT IS FURTHER ORDERED that said order be clarified so as to award said attorneys fees and costs to counsel for intervenors-appellees, personally, with subsequent reimbursement by them to the account of Legal Services Organization of Indianapolis, Inc.

APPENDIX H

Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. Section 1617, provides:

§ 1617. Attorney fees

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Pub.L. 92-318, Title VII, § 718, June 23, 1972, 86 Stat. 369.